

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

)
Amendment to the Commission's
Rules Regarding a Plan for
Sharing the Costs of Microwave
Relocation)

)
WT Docket No. 95-157
RM-8643

)
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COMMENTS OF COX & SMITH INCORPORATED

Cox & Smith Incorporated ("Cox & Smith"), pursuant to the Commission's Notice of Proposed Rule Making released in the above-captioned matter on October 13, 1995 ("NPRM")¹ hereby submits its comments with respect to the new rules and policies proposed by the Commission to address the sharing of costs of microwave relocation.

I. **Introduction**

The Commission instituted this proceeding to address issues relating to the sharing of the costs of relocating microwave facilities currently operating in the 1950 to 1990 MHz ("2 GHz") band which has been allocated for use by broadband Personal Communication Services ("PCS").

The instant Comments primarily address the relocation guidelines discussed in paragraphs 68 through 82 of the NPRM. Cox & Smith represents several microwave incumbents involved in the microwave relocation process.

As demonstrated below, although Cox & Smith supports more clearly defining the parameters for negotiations that occur during the mandatory negotiation period, Cox & Smith does not support certain portions of the specific proposals set forth in the NPRM in this regard.

¹ Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, FCC 95-426, released October 13, 1995.

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II. **Comparable Facilities Should Not Exclude Fees for Attorneys and Consultants**

In its NPRM, the Commission proposes to exclude from the costs that are reimbursable after the voluntary negotiation period has concluded fees for attorneys and consultants that are hired by the incumbent without the advanced approval of the PCS relocater.² This is inconsistent with previous assurances to the incumbents that the entire relocation costs will be paid by the emerging technology service provider.

In the context of involuntary relocation, the Commission stated in the *First Report and Order and Third Notice of Proposed Rule Making* in ET Docket No. 92-9,³ that "[t]he emerging technology service provider must guarantee payment of all relocation costs,"⁴ and in its 1993 *Third Report and Order* in ET Docket No. 92-9,⁵ the Commission stated that "... incumbents subject to involuntary relocation will have the entire relocation costs paid by the emerging technology service provider."⁶ Further in this regard, the Commission stated in the *ET Third Report and Order* that "...the rules require emerging technology licensees to pay all costs associated with an involuntary relocation."⁷ In its 1994 *Memorandum Opinion and Order*,⁸ the Commission stated that "[i]n all instances of

² NPRM at ¶ 76.

³ Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992) ("*ET First Report and Order*").

⁴ *Id.* at ¶ 24.

⁵ Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993) ("*ET Third Report and Order*").

⁶ *Id.* at ¶ 16.

⁷ *Id.* at ¶ 44.

⁸ Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994) ("*ET Memorandum Opinion and Order*").

involuntary relocation, the emerging technology provider will be required to pay all costs associated with the relocation,"⁹ and also in the *ET Memorandum Opinion and Order* the Commission stated that "[a]ll relocation costs will be paid entirely by the emerging technology licensee."¹⁰ Furthermore, in its 1994 *Second Memorandum Opinion and Order*,¹¹ the Commission stated that "[a]ll relocation costs are to be paid by the new licensee,"¹² and that "... all incumbent facilities that must relocate will also be provided with systems of equivalent reliability at no cost."¹³

Fees of technical consultants and attorneys are necessary and legitimate costs of relocation. The microwave relocation process is technically complex, and involves legal issues and documents that require the assistance of specialized legal counsel. Many, if not most, of the microwave incumbents are ill-prepared to deal with the technical and legal demands imposed upon them by this process without the aid of technical consultants and outside attorneys. They cannot reasonably be expected to adequately protect themselves in the relocation process without this aid, and they would not have needed to incur the costs of obtaining such aid but for the microwave relocation program mandated by the Commission. Accordingly, it would logically follow that, under the rules governing involuntary relocation referred to above, the fees for such services should be costs of relocation to be paid by the PCS relocater.

⁹ *Id.* at ¶ 5.

¹⁰ *Id.* at ¶ 35.

¹¹ Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (1994) ("ET *Second Memorandum Opinion and Order*").

¹² *Id.* at ¶ 22.

¹³ *Id.* at ¶ 25.

It would be inconsistent to deny during the mandatory negotiation period reimbursement for costs that appear to be the responsibility of the PCS relocater in an involuntary relocation. So long as such costs are reasonable and are incurred in good faith, there would not seem to be any reason to deny reimbursement for such costs, other than simply to accommodate the new PCS licensees by shifting such costs to the microwave incumbent. Such a shifting of relocation costs would not be fair and equitable.

Nevertheless, there is the potential for abuse if fees for attorneys and consultants are required to be reimbursed by the PCS relocater without limitations being placed on such requirement. To address this, maximum amounts for reimbursement of such fees could be established based on the number of paths being relocated or on a percentage of the total "hard" costs involved in the relocation (e.g., total cost of equipment, new towers, tower improvements, new tower site acquisition, etc.).

Simply requiring that the PCS relocater approve such fees in advance would not be an equitable solution to this problem because it would place complete control over this matter in the hands of the PCS relocater. If this approach is pursued, the PCS relocater should be required to exercise good faith in approving or disapproving such fees, and guidelines should be established to determine whether the PCS relocater is acting in good faith in this regard. Such guidelines could be based on whether the requested reimbursement for such fees exceeds an amount determined by the number of paths to be relocated or by a percentage of the total "hard" costs involved in the microwave relocation in question.

III. **Comments Regarding Reliability
Should Be Reconsidered**

In the NPRM, the Commission indicated that with respect to the reliability of a component of a microwave system, the Commission will not require the component to be

of greater reliability than the overall reliability of the system.¹⁴ Although Cox & Smith does not have the technical expertise to fully comment on this matter, this concept should be re-examined, as it is our understanding that in order to preserve a particular system reliability, it may be necessary to have the reliabilities of the individual component higher than the overall system reliability.

IV. Conclusion

As demonstrated above, although the Commission should establish more definite parameters for negotiations during the mandatory negotiation period, fees for attorneys and consultants hired by incumbents should not be precluded from being reimbursable after the voluntary negotiation period. Also, the Commission's comments with respect to comparable facilities and reliability should be re-examined.

Respectfully submitted,

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¹⁴ NPRM at ¶ 74. The second sentence of footnote 126 states, "[f]or example, if an incumbent system had a radio link reliability of 99.9999, percent but an overall reliability of only 99.999 percent because of limited battery back-up power, we would only require that the new system have a radio link reliability of 99.999 percent to be considered comparable."